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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 374

FRANCESCO TODARO,

Petitioner,

vs.

THOMAS M. PEDERSON,
District Director,
Immigration & Naturalization Service,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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The petitioner prays that a writ of certiorari issue to review the the judgment of the United States Court of Appeals for the Sixth Circuit affirming the order of the United States District Court for the Northern District of Ohio which had denied the petition for review, and for an order reversing the order of deportation theretofore entered in this case.

OPINIONS BELOW.

The judgment of the Court of Appeals is set forth in the Appendix, *infra*, p. 31. The memorandum opinion of the District Court (App. *infra*, p. 26) appears in the record at page 3a.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 18, 1962.* The jurisdiction of this Court is invoked under Section 1251(c), Title 8, U. S. C.

STATUTES INVOLVED.

1.

Summary Judgment.

Federal Rules of Civil Procedure, Rule 56(c).

2.

The Immigration and Nationality Act of June 27, 1952.

"Sections 1251(c), Title 8, U. S. C.

(c) An alien shall be deported as having procured a visa or other documentation by fraud within the meaning of paragraph (19) of section 1182 (a) of this title, and to be in the United States in violation of this chapter within the meaning of subsection (a) (2) of this section, if (1) hereinafter he or she obtains any entry into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than two years prior to such entry of the alien and which, within two years subsequent to any entry of the alien into the United States, shall be Judicially annulled or terminated, unless such alien shall establish to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws; or (2) it appears to the satisfaction of the Attorney General that he or she has failed or refused to fulfill his or her marital agreement which in the opinion of the Attorney General was hereafter

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* The Appellate Court extended the time to file a Petition for a Writ of Certiorari in the Supreme Court of the United States to August 26, 1962.

made for the purpose of procuring his or her entry as an immigrant."

STATEMENT OF FACTS

The evidence before the Special Inquiry Officer, as testified to by both this appellant and his former wife, is to the effect that they married in Licata, Italy because they were in love with each other. His testimony to that effect is found on Tr. 75 (App. page 24), where he stated that he married her because he loved her and wanted to live with her. She testified on Tr. 35 and 36 (App. pages 21-22) before the Immigration Department that she loved him when they married.

The government used her, (his ex-wife) and her mother as their witnesses against him when that testimony was given.

The marriage referred to was a civil marriage because her mother so decided, as her testimony on Tr. 48 (App. page 23), "We had already decided that the religious wedding should be in the United States. In Italy, my daughter wanted to make sure first whether he could come back to the United States. That was the most important question at that time."

The evidence further shows that on Tr. 50 (App. page 23) the mother-in-law (Mrs. DeLeonardis), in answer to a question whether she believed that he loved her daughter when he married her said in effect that he did love her daughter until he came to the United States.

After this marriage, the mother refused to permit the daughter and this appellant to consummate this marriage by living together as husband and wife. In this connection she said, "We had an agreement in Italy that they sleep together after the church ceremony in the United States," and further states that this arrangement was made by her

daughter and herself, and was made in her home while she was in Italy. Tr. 51 (App. pages 23-24).

The appellant was granted voluntary departure from the United States in 1952 because he entered illegally. While he was in the United States, he met this girl whom he married in Licata at this time. So when they met in Italy, they already had been acquainted for over four years. Because of this departure, it was necessary to obtain a visa from an American Consulate in Italy, in this case Palermo. The daughter testifies that she and her mother went to the Consulate and made out the papers and arranged for this visa. That after sixteen weeks, it was granted. She testified that she had to make trips to three Consulates to get her husband into the United States, and she gave as the reason for her efforts, "I had to make sure before I married him." She further testified that she loved him and that he loved her. Tr. 35 and 36. (App. page 21.)

The evidence shows that they paid his way to the United States and brought him to Cleveland, but didn't let him live in the mother-in-law's house where the daughter, his wife, lived. Tr. 64 (App. page 24). It was testified that the mother-in-law arranged for Todaro to stay with friends before he came to the United States, and that this arrangement was made a month or two before he came.

The appellant obtained employment as a baker, and gave his wife the first check, which she accepted, but the second one she refused to take because her mother told her not to accept same. (Appendix page 21.)

The date for the religious wedding was set in the Catholic church. The appellant complied with all the requirements and requests of Father Tamburri, and obtained all the documents from Italy. But 3 days before the wed-

ding, the mother-in-law and the daughter cancelled the wedding, and immediately sued for divorce, and after the divorce was obtained, went to the Immigration authorities and did start this case.

QUESTION 1.

SUMMARY JUDGMENT.

When the Hearing Examiner made a Finding "that the crux of this case is the matters in dispute, as to who was basically responsible for the dissolution of the marriage and the reasons therefor,"

Was it error on the part of the Examiner to again make a Finding in the same opinion after stating that there are many areas wherein the parties disagree as to what actually occurred, that he, however, does not believe that a discussion as to those matters or a determination as to the truth and accuracy of the statements of either respondent or government witnesses are essential to the decision in this case.

Our answer is that the Hearing Examiner committed error and that the District Judge in granting summary judgment erred in affirming this Finding.

This holding eliminated the necessity for the Hearing Examiner to determine who was telling the truth. As long as he believed that the truth of these disputed matters is not "essential" to the decision in this case, then how could he decide which one was responsible for the dissolution of the marriage? Not having determined who is telling the truth, he could not decide who is responsible for the breaking of the marriage. Therefore, he could not view this case in a fair and impartial manner and his decision, based only on the decree dissolving the marriage, is arbitrary and capricious and is reversible error. (See *Karayannis v. Brownell*, 251 Fed. 2, 882.)

The District Judge in granting Summary Judgment affirmed the erroneous opinion of the Hearing Examiner and therefore could not comply with the Rule 56(c) that the inferences to be drawn from the underlying facts contained in the evidence in this case *must be viewed in the light most favorable to the party opposing the motion.*

The Record in this case considered in the light most favorable to the appellant, shows that contrary inferences of fact are permissible and therefore the motion of the Summary Judgment should have been denied.

Our discussion is based on the latest case decided by the United States Supreme Court on May 14, 1962, in the case of *United States vs. Diebold, Inc.* The case is to be found in 82 Supreme Court, page ___, and is known as No. 286 on the Docket of the United States Supreme Court October Term 1961.

In the head notes of this case can be found the answer. In Volume 8, Law Edition 2nd, No. 3, on page 176, June 4, 1962, the Court says:

> "On Motion for Summary Judgment under Federal Civil Procedure Rule 56(c), the inferences to be drawn from the underlying facts * * * must be viewed in the light most favorable to the party opposing the Motion."

And on Note 2 under head notes, same page 176, the Court says:

> "A Summary Judgment is improperly entered under Federal Civil Procedure Rule 56(c) against (an appellant) where the Summary Judgment is based on findings of fact * * * and the record, considered in the light most favorable to the (appellant) shows that contrary inferences of fact are permissible."

We claim that such situation is to be found in the case at bar.

The Court in the *Diebold* case held that Summary Judgment is properly entered under Federal Civil Procedure Rule 56(c) against the appellant where the Summary Judgment is based on findings of fact and the record, considered in the light most favorable to the Appellant shows that where contrary inferences of fact are permissible, such a Summary Judgment is improper. In the case at bar, the Government filed a Motion for Summary Judgment. This was opposed by a Motion to Dismiss, together with a brief, and a Request to be heard on the Motion, as well as on the case.

The Court overruled the defendant's Motion to Dismiss and granted the Motion for Summary Judgment. We think the Court erred.

It must be remembered here that the Court did not hold any hearing on the question of the Summary Judgment, but followed the decision and the opinion of the Inquiry Officer of the Immigration Department. Therefore, it is important for us to discuss, as briefly as we can, wherein the Inquiry Officer's Opinion is entirely wrong.

To begin with, he says on page 3 of his Opinion (App. pp. 24-25) in the Immigration and Naturalization file, as follows:

> "The crux of this case is the matters in dispute, viz., who was basically responsible for the dissolution of the marriage and the reasons therefor. The testimony of respondent's witnesses is of little value in determining these qualifications.
>
> "Respondent asserts that Mrs. DeLeonardis (his mother-in-law) always worked toward dissolution of the marriage; that Frances Garofalo (his wife) said to him that she desired to be free of any restraint imposed by the bonds of matrimony in order to continue having affairs with men; and that he was at all times ready and willing to have the religious cere-

mony performed, in Italy or in the United States, and to consummate the marriage."

"There is evidence favorable to the respondent's position: proof that he rented a room during the period of reconciliation (he was accompanied in this by his wife); proof that he obtained all papers required by church officials to revalidate the marriage (as testified to by Father Tamburri); and proof that he never had the physical opportunity to consummate the marriage. In addition, Mrs. De Leonardis admitted that she opposed the marriage initially. Furthermore, although Frances testified that she was willing to consummate the marriage prior to the religious ceremony, and Mrs. De Leonardis maintained that she would not have actively opposed it, I doubt their complete truthfulness in this respect. This doubt is engendered by the precepts of their religion and the admission that arrangements were made prior to respondent's entry in the United States to have him sleep at the house of another person."

These facts as we see it, and as anyone would have to admit, which the Hearing Officer calls evidence favorable to the respondent's position are basic in this case. The Hearing Officer says *"the crux of this case is the matters in dispute, who was basically responsible for the dissolution of the marriage and the reasons therefor."*

He says that this appellant did go and obtain rooms where they were going to live; that he attended the church requirements—he signed all the documents—he obtained all the papers and documents from Rome as the rules of the church required in a marriage such as this; being a revalidated marriage it requires considerable signing and a number of meetings have to be attended. This was all testified to by Father Tamburri who said that this young man attended every one of them promptly. The Hearing

Examiner also pointed out that it was not the appellant's fault and that he never had the physical opportunity to consummate the marriage. Now all of this is basic, as we said before.

It is basic because it certainly throws a great deal of light on the intentions of this man to consummate the marriage; whether he intended to live with his wife; whether he intended to break off the marriage. He immediately obtained employment as a baker (he still has the same job). He obtained rooms—his wife was with him when this was done. In addition, appellant testified that he took his wife to restaurants and places of amusement. Tr. 82 (App. p. 24). Now there isn't much more that he could have done that he failed to do. Now these are facts that no one can doubt because the Hearing Examiner is the one who stated them and took them from the record. So one would think that these facts would have to stand. They are not controverted. No one disputed them. But now witness his further statements:

> "Respondent's former attempt to marry a United States citizen at a time when he was the subject of deportation proceedings (about 5 years before), and his insistence on knowing the citizenship status of Frances prior to his proposal of marriage cast considerable doubt on his profession of good faith."

Now we say what doubt can be cast upon this man's action of good faith in trying to make this marriage good, as he stated several paragraphs above. How can he now say that just because 5 years before he was trying to get married to a girl to keep from being deported throws a great deal of doubt on his profession of good faith in this marriage. How can a suspicion of this kind upset the factual matters that he himself recites in this particular opinion. He continues further (Appendix page 25):

> "There are many other areas wherein the parties disagree as to what actually occurred. *I do not believe that a discussion as to those matters or a determination as to the truth and accuracy of the statements of either respondent or government's witness is essential to the decision in this case.*" (Italics ours)

In view of this statement, we certainly feel that we have a right to ask how then can he decide who was responsible for the dissolution of the marriage and the reasons therefor. Inasmuch as he does not believe that a discussion as to those matters or a determination as to the truth and accuracy of the statements of either respondent or government's witness is essential to the decision in this case. He is certainly ruling against his own statement on the top of the page.

The Court in the *Diebold* case (8 L. ed. 2d 176) (82 S. Ct. ____) says:

> "On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. * * *"

Therefore, when the District Judge affirmed this opinion by the summary judgment, he did so without regard that the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the opposing party. Like in the *Diebold* case, a study of the record in this light leads us to believe that inferences contrary to these drawn by the Examiner and the Trial Judge are permissible. Therefore the summary judgment was improper.

QUESTION 2.

In a case where the government established prima facie fraud, and the burden is on the appellant to establish to the satisfaction of the Attorney General that he did not commit any fraud in such marriage,

Was it error on the part of the examiner and the district judge who affirmed the opinion of the examiner by granting summary judgment, when the said examiner held that it is not necessary for him to have a discussion of disagreements in the testimony, and further that he does not believe that a determination as to the truth and accuracy of the statements in this case of either the respondent or government's witnesses is necessary and essential to his decision in this case, because, as he states, the important matter in this case is the decree of divorce dissolving this marriage?

Our answer is "Yes. It was error on the part of both the examiner and the judge."

It was error because it did not comply with the law of the Immigration and Nationality Act of 1952, under which Act this deportation was ordered, and prevented the appellant's testimony and other evidence from being considered in the decision.

Assuming, arguendo, that the Government made a prima facie case of fraud by reason of this marriage because same was terminated by divorce within the two year period as the law states, it prevented the operation of what followed in this law **"that the alien is deportable unless such alien shall establish to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws."**

It can be readily seen that in such a case there are always charges and counter-charges, and is often replete

with accusations and recriminations. It becomes the duty of the Hearing Examiner to decide whether the alien has established to the satisfaction of the Attorney General that he did not contract this marriage in a fraudulent manner, and such defense becomes the appellant's burden under this law. Then, we ask here, how can he establish that he did not enter this marriage in a fraudulent manner if the Hearing Examiner says *"I do not believe that a discussion as to those matters, or a determination (by him) as to the truth and accuracy of the statements of either the respondent or Government's witnesses is essential to the decision in this case"*? (Italics ours.)

If the statements of the appellant do not mean very much to the Hearing Examiner, and if he is not even interested in the truth or falsity of the statements on the part of either the respondent or the Government's witnesses, and if that is not essential to the decision in this case, then why did Congress put in this law that it is the alien's burden to establish that such a marriage was not contracted for the purpose of evading any provisions of the Immigration law?

In what other manner can this appellant establish to the satisfaction of the Attorney General, if not by testifying and bringing in witnesses or evidence that he attempted to go through with the marriage; that it was the mother-in-law that was wrongfully interfering in their marriage. If matters like renting rooms where they would live, and attending meetings at the church with the priest to revalidate this marriage, which took quite a number of meetings, is of no importance to the Examining officer, and if he does not need such evidence that the appellant got a job immediatelly, and gave his wife the first check, and took her to restaurants and places of amusement during the reconciliation period provided by the Court; if all of

those are not important to the Hearing Examiner, then we ask how—in what other manner can this appellant establish to the satisfaction of the Attorney General or this Hearing Examiner that he tried his very best to consummate this marriage and to go through with every agreement that was made?

Then we say what other means did the Hearing Examiner rely on, or what other evidence that took place in this case did the Examiner adopt or use in arriving at his decision, if these discussions and the testimony of the appellant and the Government's witnesses did not mean anything affecting his decision.

The answer is contained in the same Opinion, page 4, where he says:

> "However, one matter is of importance. In his opinion granting the petition for divorce filed by Frances Garofalo, the Trial Judge indicated that he was granting the divorce rather than the plea for annulment because that was the proper remedy in Ohio where fraud in procurement of the marriage is established."

So we see that he solely relied on the granting of the divorce as a matter of importance, and the other matters that took place in this case are evidently unimportant to him because he says: "*I do not believe a discussion as to those matters or a determination as to the truth and accuracy of the statements of the respondent and the Government's witnesses is essential to the decision in this case.*"

Therefore, the proper question is, inasmuch as he disregarded the evidence of the respondent and the witnesses, and he did not even feel or believe that he ought to discuss it to find out either the truth or falsity or accuracy of the statements, and claimed that they were not necessary to his decision in this case, is the fact that the Common Pleas

Court granted a divorce dissolving this marriage sufficient to order a deportation of this man? Now that is what we are facing in this case.

This question is easily answered when one realizes that by this opinion, he denied the appellant the right to establish to the satisfaction of the Attorney General that his marriage was not contracted fraudulently. The sole purpose of placing this particular statement in this law, under which this deportation was brought, is to give the appellant a chance to explain, to testify, to bring witnesses before the Hearing Examiner, or in the Court, or wherever this case may be, to offset the prima facie case of fraud which is established when the Government shows that this man entered the United States after a marriage to a citizen, and his marriage was dissolved by a divorce within two years, and thus he becomes deportable.

So we have this picture before us. Page 3 of his Opinion (Appendix page 24), he states:

> "The crux of this case is the matters in dispute as to who was basically responsible for the dissolution of the marriage and the reasons therefor."

Then on the last paragraph on that page, he says, and we repeat:

> "I do not believe that a discussion as to those matters or a determination as to the truth and accuracy of the statements * * * is essential to the decision in this case."

Now, which does he mean?

The law is clear. The Statute, as set forth herein is 241(c) of the Immigration and Nationality Act of 1952, now Section 1251(c) Title 8 U. S. C.

We desire to cite the case of *Karayannis vs. Brownell*, 251 F. 2d, 882. In that case, the District Court for the Dis-

trict of Columbia granted Summary Judgment against an alien practically for the same reasons as are contained in the case at bar, and ordered him deported. Deportation proceedings were instituted in April, 1951, charging the alien with having entered the United States in violation of the Immigration Act, in that he entered the United States in December, 1948, and was not a non-quota immigrant, and that his visa had been obtained through fraud, which is precisely the charges in the case at bar affecting the appellant.

Hearings were conducted. The Government called no witnesses except the former wife's lawyer, through whom was introduced the transcript of the uncontested annulment hearing before the New York Court, which held that the marriage was annulled by reason of fraud.

Like in our case before the Immigration Hearing officer, the appellant testified to the ill treatment by the wife, recited various threats, and that because of her conduct towards him, he had to leave the house. Like in our case he sought to testify in refutation of the wife's charges as revealed by the annulment proceedings, and denied many of the assertions that his wife charged against him in the annulment petition.

The Hearing Examiner in the *Karayannis* case ruled that what might have been his defense to the charges in the annulment proceeding had he appeared therein "would be immaterial (in this case) and in no way would affect this judgment, so I will not permit them on the record of this hearing."

The Court there held under the Law of 1937 primarily Section 3 of the Act of May 14, 1937 (50 Statutes 164-165)—this is found on page 883 of the cited case. The Attorney General's brief tell us:

"It is the Government's position that once it is shown that an alien who obtained a non quota or preference quota visa by reason of his marriage to an American citizen, and it is further shown that this marriage was subsequently annulled because of the alien's fraud, then the alien is deportable."

The Government in that case argued that a fraud upon the wife at the time of the marriage likewise constitutes a fraud upon the United States.

The Court discusses this particular situation on Page 884.

The Government in the *Karayannis* case offered no evidence of fraud upon its Immigration authorities. Neither did the Government offer any such evidence in the case at bar. It called no witnesses. In our case, it did call witnesses, but it meant nothing to the Hearing Examiner, because while he started out to hold that the crux of the case is who broke up this marriage, and then when he heard the witnesses (his own, whom he accused of lying), as well as testimony of the respondent and his witnesses, then he decided that their testimony is not necessary for his decision, and that whether they are true or false is immaterial to him in his arrival at a decision. So while the *witnesses were called*, it practically amounted to the same thing as in this *Karayannis* case where no witnesses were called by the Government except the lawyer for the wife. So in effect, it amounted exactly to the same thing.

In the *Karayannis* case, the Government relied on the Decree of Annulment solely, and in the case at bar, the Todaro case, the Hearing Examiner, in behalf of the Government, relied solely on the Divorce Decree that was handed down by the Common Pleas Court.

On page 885, the Court here cites the law of the Immigration and Nationality Act of 1952 under which the

case at bar is being tried, and italicizes the language of the law beginning with "unless such alien shall establish to the satisfaction" * * * and ends with "the purpose of evading any provisons of the Immigration laws." Without going in detail, the Court decided that the Immigration authorities erred when they relied on the Court Decree granting an Annulment to the wife of *Karayannis*, and says as follows:

> "We are satisfied that as a matter of law the Immigration authorities must here have misconstrued the Act, and that the Court should have declared the appellant entitled to a hearing in which the facts are to be found with the Act interpreted and applied as we have outlined." Reversed and Remanded for further proceedings not inconsistent herewith.

Precisely as in the case at bar, we are satisfied that as a matter of law, the Hearing Examiner has misconstrued the Act, and that instead of giving the appellant a chance, as the law requires, to explain by testimony and establish the evidence, oral or written, or in any method that he can to the satisfaction of the Attorney General, that such marriage was not contracted for a fraudulent purpose or for the purpose of evading any provisions of the Immigration laws.

This Hearing Examiner prevented him from establishing his defense as provided in this law by announcing that he does not believe that a discussion of those matters (evidence) or a determination as to the *truth and accuracy of either the respondent or government witnesses* is essential to the decision. Then, immediately following this he stated in the opinion:

"However, one matter is of importance * * *,"

namely the decree of divorce dissolving this marriage. The Court refused to grant an annulment on the grounds of

fraud and did grant the divorce on grounds of gross neglect of duty.

Of course this put this case squarely under the opinion in the *Karayannis* case.

Although this *Karayannis* case was brought under the law of 1937 Section 3 of the Act, the 2 statutes differ only in respect where the present statute makes it mandatory to permit alien to put up a defense. The previous statute did not and yet the Appellate Court reversed the decision in the *Karayannis* case on the sole ground that the appellant was not afforded the right to put up his defense. In its reversing opinion (885) the Court says that it was the present Statute 1251(c) that it considered "not without significance" in arriving at its decision. The Court concludes:

> "We are satisfied that as a matter of law, the Immigration authorities must here have misconstrued the Act and that the Court should have declared the appellant entitled to a hearing *in which the facts are* to be found with the Act interpreted and applied as we have outlined. Reversed and remanded."

While in the case at bar, he did permit the appellants witnesses to testify, he nullified their testimony by holding that no consideration need be given the disagreements nor is it necessary or essential to a decision in this case for him to determine the truth or accuracy of the respondents or his witnesses' statements. The only "important matter" in the case is the Decree of Divorce and his holding is exactly the holding of the Examiner in the *Karayannis* case.

CONCLUSION.

The evidence shows that both the appellant and his wife testified that they married because they were in love with each other. The mother-in-law testified that at first she wasn't for it but then she came around to agreeing to the marriage because she saw that her daughter was greatly in love and she wanted her to be happy.

The government offered no evidence of fraud upon its immigration authorities. Therefore, the fraud would have to be found by the Hearing Examiner from the testimony only.

Inasmuch as he decided as per his opinion, page 3 and 4 (App. page 25) that is his belief that the disagreements in the testimony are not important to him in arriving at a decision and that he need not find or determine the truth or who is telling it because it is not essential to his decision in this case, he could not have found who was basically responsible for breaking up this marriage. And, inasmuch as he relied and gave his decision merely on the ground that the Common Pleas Court granted a decree dissolving this marriage and that such act was the only important matter in this case, he therefore erred in his decision, was wrong in his opinion, and his findings are arbitrary and capricious, and erroneous in law.

The District Judge who adopted his findings and opinion was equally in error because when he granted summary judgment he did so at a time and in such manner that "the record, considered in the light most favorable to the appellant, shows that contrary inference of fact are permissible" therefore, the judge erred when he granted summary judgment.

RELIEF.

This Honorable Court is respectfully urged to find and adjudge that the findings of the Examiner and the District Judge were erroneous in law; that the evidence, as per Opinion of Hearing Examiner is not sufficient in law upon which to base a deportation order.

That this Court is further respectfully urged to enter an order reversing and setting aside the findings and judgment of the court below; and to enter an order reversing the decision of the Court of Appeals for the Sixth Circuit and to order this appellant to be discharged from custody, or in the alternative to grant appellant a new hearing.

Respectfully submitted,

HENRY C. LAVINE,

Attorney for the Appellant.

APPENDIX.

The following testimony is found in the original Transcript of the testimony taken in the Immigration Department before Special Inquiry Officer Milich. (75.)

This appellant testifies that he and his wife were married in Licata, Italy because they were in love with each other. He again stated that he married her because he loved her and wanted to live with her.

Counsel to Appellant (Page 1b):

(19) Q. You obtained that job at—can you tell us when? A. About the 20th of July.

Q. And are you still working there now? A. Yes, sir.

Q. When you said the 20th of July, you mean the 20th of July, 1957? A. Yes, sir.

Q. At the time you obtained this job did you get paid the first or the second week? A. I got paid every week.

Q. What did you do with your first check that you got? A. I signed the check, then I gave it to my wife.

Q. What did you do with the second check that you received for your wages? A. I tried to give it to her, but she didn't accept it. She said that she didn't need that money.

Q. Did your mother-in-law, (her mother), have anything to say about that? A. I tried to give the check to my wife and she showed that to her mother and her mother threw it back at me.

Q. Did she say anything about it, I mean the mother? A. She didn't say anything.

Counsel to wife (pertaining to marriage in Licata) (3b):

(36) Q. Now, did you mother agree? A. What?

Q. That you should marry him? Did your mother? A. She didn't want me to marry him.

Q. Right from the start? A. Right from the start.

Q. Did she say you shouldn't marry him? A. Well, I didn't—I went against my mother's will by marrying him.

Q. She said you should not marry him? A. Yes.

Q. She didn't like him is that it? A. Why, she liked him afterwhile.

Q. Afterwhile, but at the beginning she didn't? A. No.

TESTIMONY OF ANGELINA DELEONARDIS (Mother-in-law) (3b):

Examining Officer to mother-in-law (pages 48-49):

Q. Now, have you had any arguments with him since he arrived in the United States? A. Yes, the first three days the trouble started. He called my daughter stupid.

Q. Did you ever hit Mr. Todaro? A. It was on the 15th of September that he had an argument with my daughter and when I came home I asked him, I said, "What goes on here," and he said, "I will advise you that I don't care for your daughter any more because your daughter is sick and if she would have any children, she would probably burn them, or kill them and furthermore you are a tramp yourself."

Q. It that what caused you to strike him? A. I told him at that time to leave my house and go away to leave us in peace, but he wouldn't go and he continued to say that he had his stomach full of the trouble and the things that he had seen around my house. At that time, when he insisted that he would stay there, I slapped him twice, on each side of his face.

* * * * *

Counsel to mother-in-law:

(50) Q. Mrs. DeLeonardis, do I understand that at

the beginning when Todaro met your daughter, you were against him and later on. * * *

By Special Inquiry Officer:

Just a second, Mr. Lavine. Get the answers on the record.

By mother-in-law:

A. Tha't's right. I said no.

Counsel to mother-in-law:

Q. And later on you learned to like him? A. Yes, afterwhile I thought he was an angel and then he turned out to be a devil.

Testimony by Mrs. DeLeonardis (mother-in-law) as appears on page 4b of the Appendix, taken from the original Transcript, page 50, as follows:

Q. But, when he turned out to be an angel first, you turned to like him, right? A. Yes, because my daughter loved him and I had no choice. I had to make my daughter happy.

The mother-in-law also testified on Page 4b of the Appendix of Appellee that she liked him (appellant) "because my daughter loved him and I had no choice. I had to make my daughter happy."

"We had already decided that the religious wedding should be in the United States. In Italy, my daughter wanted to make sure first whether he could come back to the United States. That was the most important question at that time."

Mother-in-law to Counsel (Page 51):

"We had an agreement in Italy that they sleep together after the church ceremony in the United States."

She further stated that this arrangement was agreed to by her daughter and herself and was made in her home while she was in Italy.

(Page 64) She also testified that she arranged for appellant to stay with her friends before he came to the United States, and that such arrangement was made a month or two before he came.

TRANSCRIPT OF TESTIMONY.

(Page 72) Rented rooms by Appellant paid a down-payment. Receipt introduced. Wife was with h. m.

(Page 73) But mother-in-law refused to talk to him 2 days later she backed out. Reason she wanted to be free and didn't want to be married. She told me that she had sexual relations with men in garages and cars.

(Page 73) Wife agreed to stay together and have a family.

(Page 75) Married her because he loved her and wanted to live with her.

(Page 80) Wife threw chair at me. Mother-in-law slapped him and then cancelled wedding.

(Page 82) The day the judge gave us 30 days to reconcile. Saw my wife after. Took her home, took her to dinner, took her to the theatre and was ready to do everything she wanted.

Page 3 of the Special Inquiry Officer's Opinion:

"The crux of this case is the matters in dispute, viz., who was basically responsible for the dissolution of the marriage and the reasons therefor. The testimony of respondent's witnesses is of little value in determining these questions."

"Respondent asserts that Mrs. DeLeonardis always worked toward dissolution of the marriage; that Frances Garofalo stated that she desired to be free of any restraint

imposed by the bonds of matrimony in order to continue having affairs with men; and that he was at all times ready and willing to have the religious ceremony performed in Italy or in the United States and to consummate the marriage."

"There is evidence favorable to the respondent's position: proof that he rented a room during the period of reconciliation; proof that he obtained all papers required by church officials to revalidate the marriage; and proof that he never had the physical opportunity to consummate the marriage. In addition, Mrs. De Leonardis admitted that she opposed the marriage initially. Furthermore, although Frances testified that she was willing to consummate the marriage prior to the religious ceremony, and Mrs. De Leonardis maintained that she would not have actively opposed it, I doubt their complete truthfulness in this respect. This doubt is engendered by the precepts of their religion and the admission that arrangements were made prior to respondent's entry into the United States to have him sleep at the house of another person."

Pages 3 and 4 of the Special Inquiry Officer's Opinion:

"There are many other areas wherein the parties disagree as to what actually occurred. I do not believe that a discussion as to those matters or a determination as to the truth and accuracy of the statements of either respondent or Government's witnesses is essential to the decision in this case."

"However, one matter is of importance. In his opinion granting the petition for divorce filed by Frances Garofalo, the trial judge indicated that he was granting the divorce rather than the plea for annulment because that was the proper remedy in Ohio where fraud in procurement of the marriage is established."

MEMORANDUM OF OPINION OF THE DISTRICT COURT.

(Filed April 7, 1961.)

McNAMEE, J.:

On October 20, 1959, after full hearing, the Special Inquiry Officer of the Department of Immigration held the petitioner, Francesco Todaro, an alien to be deportable under Title 8, § 1251(c). Pursuant to such determination an order of deportation issued. Thereafter, on May 6, 1960, the Board of Immigration Appeals affirmed the determination of the Special Inquiry Officer and dismissed petitioner's appeal. In this action for review petitioner alleged that the hearing before the Special Inquiry Officer was conducted unfairly and that the decision of the Special Inquiry Officer and the affirmance thereof by the Board of Immigration Appeals were contrary to law. He seeks reversal of the decision of the Immigration Department and an order restraining the execution of the order of deportation. Defendant has filed a motion for summary judgment, asserting that the record of the deportation hearing shows that defendant is entitled to a judgment of affirmance of the Immigration Department's decision as a matter of law. In opposing the motion petitioner contends that since the record below discloses genuine issues of material facts there can be no summary judgment granted under Rule 56 F. R. C. P. Petitioner's argument is premised on the assumption that the scope of review in this action is as broad as the permissible range of inquiry in a civil action originating in a district court. This assumption is erroneous. "Summary judgment may be peculiarly appropriate in an action to enjoin or enforce an administrative order because of the type of review provided by statute." 6 Moore, *Federal Practice*, 2d Ed., § 56.17(3), p. 2175. Petitioner is not entitled to a trial de novo but is

limited to a review of the record before the Hearing Officer. The case is therefore ripe for summary judgment. *Midwest Farmers, Inc. v. United States*, 64 F. Supp. 91, 96; *National Broadcasting Co. v. United States*, 47 F. Supp. 940; *aff'd.* 319 U. S. 190; *Fields v. Hannegan*, 162 F. 2d 17; *Irvin v. Hobby*, 131 F. Supp. 851. The motion for summary judgment as applied here is tantamount to a motion to affirm the judgment of the administrative body as being legally correct and presents only questions of law. The deportation proceeding was instituted under favor of Title 8, § 1251(c), which provides:

"§ 1251. Deportable aliens—General classes.

* * *

(c) An alien shall be deported as having procured a visa or other documentation by fraud within the meaning of paragraph (19) of Section 1182(a) of this title, and to be in the United States in violation of this chapter within the meaning of subsection (a)(2) of this section, if (1) hereafter he or she obtains any entry into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than two years prior to such entry of the alien and which, within two years subsequent to any entry of the alien into the United States, shall be judicially annulled or terminated, unless such alien shall establish to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws, or (2) it appears to the satisfaction of the Attorney General that he or she has failed or refused to fulfill his or her marital agreement which in the opinion of the Attorney General was hereafter made for the purpose of procuring his or her entry as an immigrant."

On January 5, 1956, petitioner, a native citizen of Italy, was married to Frances Garofalo, an American citi-

zen, in a civil ceremony at Licata, Italy. On the basis of the marriage, petitioner, on May 16, 1957, obtained a non-quota immigration visa and entered the United States on June 29, 1957. The marriage was terminated on February 13, 1959, by a decree of divorce issued by the Common Pleas Court of Cuyahoga County, Ohio. Thus the alien's marriage was entered into less than 2 years prior to his entry into the United States and was terminated judicially within 2 years subsequent to such entry. The alien, therefore, bore the heavy burden of establishing to the satisfaction of the Attorney General that the marriage was not contracted for the purpose of evading any provision of the immigration laws.

Discussion.

The jurisdiction of this Court is limited narrowly to ascertaining whether the proceeding before the Special Inquiry Officer was conducted fairly and whether his finding that the petitioner had not sustained the burden thrust upon him by the statute is supported by substantial evidence. This Court is without authority in this action to weigh the evidence, to determine the credibility of the witnesses or to substitute its judgment for that of the Special Inquiry Officer. *Cartellone v. Lehmann*, 255 F. 2d 101 (6th Cir. 1958); *In re Cartellone*, 148 F. Supp. 676, 681 (N. D. Ohio 1957). Petitioner's claim that he was not afforded a fair hearing is without substance. The Hearing Officer evidenced a scrupulous regard for the requirements of a fair hearing. He continued the hearing from time to time to enable petitioner to produce witnesses in his behalf. He afforded petitioner an opportunity to testify at each of the several partial hearings that were held. Petitioner was represented by experienced and able counsel and was in all respects accorded a hearing that met the

highest standards of fairness. It would serve no useful purpose to review at length the conflicting evidence in the record. As correctly observed by the Special Inquiry Officer "The major issue is credibility." That issue relates almost entirely to the central dispute as to whether petitioner or his former wife and mother-in-law was responsible for the dissolution of the marriage. In addition to that basic issue several relevant and undisputed facts emerge from the record. It was shown that petitioner was previously in the United States from 1952 to 1953. He entered this country on that first occasion as a stowaway and was deported. Prior to his returning to his native country he proposed marriage to one Annie Marie Orlando, a United States citizen, and gave her $500 to pay her passage to Italy. The $500 was returned to petitioner. Late in 1955, while petitioner's former wife, then Frances Garofalo, was in Italy with her mother, Angelina de-Leonardi, she met the petitioner in the city of Licata. Petitioner learned that Frances was an American citizen and Frances and her mother learned of petitioner's previous deportation from the United States. The three of them made trips to American consulates in Rome, Naples and Palermo at the mother's expense for the purpose of ascertaining the procedure to be followed in order to effectuate petitioner's return to the United States. The parties were married in Licata on January 5, 1956 at a civil ceremony. There was an understanding between them that a religious marriage ceremony would be performed in the United States after petitioner was admitted to this country as a permanent resident. Petitioner's passage to the United States was paid for by his wife's mother who advanced him more than $100 in addition. At petitioner's request he was met in New York by his wife and her mother. On arrival at Cleveland petitioner lived with a friend of Mrs.

deLeonardi. At no time was the marriage consummated by cohabitation nor did the parties at any time reside in the same dwelling. Shortly after petitioner arrived in Cleveland arrangements were made to have a religious ceremony performed on October 19, 1957. In mid-September, 1957, there was a serious quarrel between the husband and wife and between petitioner and his mother-in-law. Shortly thereafter the wife cancelled the religious ceremony. In October 1957 she filed her action for divorce and the petitioner filed an answer and cross-petition. After hearing evidence in the divorce case the Common Pleas Court deferred final judgment for a period of 30 days to afford the parties an opportunity to reconcile their differences. No reconciliation was effected and a decree of divorce was granted February 13, 1959. Each party accuses the other of being the procuring cause of the dissolution of the marriage.

The record is replete with accusations and recriminations, highlighted by colored and exaggerated statements by both parties. The Special Inquiry Officer found that there was evidence favorable to petitioner and the officer had no illusions about the truthfulness of certain of the testimony of petitioner's then wife and mother-in-law. However, the Hearing Officer was not favorably impressed with most of the petitioner's testimony, particularly that considerable portion of it which related to the alleged voluntary admissions by Frances of "prior promiscuity." Petitioner contends vigorously that Mrs. de Leonardi deliberately and artfully contrived to destroy the marriage. The record does not sustain this contention. Mrs. de Leonardi gave her consent to the civil marriage in Italy. She paid the traveling expenses of petitioner to three American consulates, she paid petitioner's passage to this country and forwarded to him additional funds, she

assisted materially in preparations for the religious ceremony. Until the quarrels of mid-September, Mrs. de Leonardi had given persuasive evidence over a substantial period of time of her desire to assist her daughter and her son-in-law in their plans for a religious ceremony. Until September 1957 petitioner's former wife also co-operated in every way to bring about the fruition of the plans made by the parties at the time of the civil marriage in Italy. In the light of their long and friendly attitude toward petitioner, it is reasonable to conclude that the change in attitude of Frances and her mother was induced by the offensive conduct of the petitioner after his arrival in Cleveland. Further comment is unnecessary. The Hearing Officer enjoyed the inestimable advantage of seeing and hearing the witnesses and was in the best position to determine the accuracy, reliability and truthfulness of their testimony. The undisputed facts make out a prima facie case against the petitioner and the determination of the Hearing Officer that petitioner failed to sustain the burden of proof cast upon him by the statute is supported by substantial evidence.

The decision of the Immigration Department is affirmed.

CHARLES J. MCNAMEE,
United States District Judge.

April 7, 1961.

ORDER OF THE UNITED STATES COURT OF APPEALS.

(Filed June 18, 1962.)

BEFORE: MCALLISTER and O'SULLIVAN, *Circuit Judges*, and BOYD, *District Judge*.

The above cause coming on to be heard upon the record, the briefs of the parties, and the argument of counsel in open court, and the court being duly advised:

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED that the judgment of the District Court be and is hereby affirmed upon the opinion of Judge McNamee, reported in _____ Fed. Supp. _____.

APPROVED FOR ENTRY:

THOMAS F. McALLISTER,
United States Circuit Judge.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 374

FRANCESCO TODARO, *Petitioner*

v.

THOMAS M. PEDERSON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW.

The opinion of the court of appeals (Pet. 31-32) is not yet reported. The opinion of the district court granting respondent's motion for summary judgment (Pet. 26-31) is reported at 205 F. Supp. 612.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1962. The petition for a writ of certiorari was filed on August 25, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was afforded a fair opportunity in a deportation hearing to establish that his dissolved marriage was not contracted for the purpose of evading the immigration laws.

2. Whether a petition for review of a deportation order may be determined by the district court on a motion for summary judgment on the basis of the record of the deportation hearing.

STATUTE INVOLVED

Section 241(e) of the Immigration and Nationality Act of 1952, 66 Stat. 208, 8 U.S.C. 1251(e) provides:

> An alien shall be deported as having procured a visa or other documentation by fraud within the meaning of paragraph (19) of section 212(a), and to be in the United States in violation of this Act within the meaning of subsection (a)(2) of this section, if (1) hereafter he or she obtains any entry into the United States with an immigrant visa, or other documentation procured on the basis of a marriage entered into less than two years prior to such entry of the alien and which, within two years subsequent to any entry of the alien into the United States, shall be judicially annulled or terminated, unless such alien shall establish to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws; or (2) it appears to the satisfaction of the Attorney General that he or she has failed or refused to fulfill his or her marital agreement which in the opinion of the Attorney General was hereafter made for the purpose of procuring his or her entry as an immigrant.

STATEMENT

Petitioner, a native of Italy, sought judicial review in the United States District Court for the Northern District of Ohio of an order of deportation under Sections 241(a)(2) and 241(c) of the Immigration and Nationality Act of 1952. He had been ordered deported on the ground that he illegally entered the United States with a fraudulent immigrant visa on the basis of a marriage entered into less than two years prior to his entry, terminated within two years subsequent to his entry. The district court sustained the respondent's motion for summary judgment. The court of appeals affirmed. The evidence presented before a special inquiry officer may be summarized as follows:

In September or October 1955, petitioner had met Frances Garofalo, an American citizen, and her mother, Angelina De Leonardis, in Licata, Italy. They had previously seen each other on one previous occasion, in 1952, in the United States (R. 7, 26).[1] Petitioner, on inquiry, learned of her American citizenship (R. 27). After a short courtship, they agreed to marry (R. 28). Prior to the marriage, petitioner took Frances and her mother to three American consulates in Italy to find out whether he would be able to enter the United States (R. 52). On January 5, 1956, petitioner and Frances were married in a civil ceremony in Italy (R. 8, 28). It was agreed that the marriage would be solemnized by a religious ceremony in the United States (R. 28). Frances and her mother then returned to the United States. On June 29, 1957, peti-

[1] The immigration file has been lodged with the Clerk of the Court. The designation "R." refers to the transcript of the hearing before the special inquiry officer, which is a part of the file.

tioner entered this country on a nonquota immigrant visa (R. 2-3, 6). Mrs. De Leonardis paid for his passage (R. 53). After his arrival in the United States, his mother-in-law arranged for him to live apart from Frances. A church wedding was scheduled for October 19, 1957 (R. 51, 88). In September 1957, several days after arrangements had been made for the religious validation of the marriage, petitioner and Frances quarrelled, and Frances cancelled the church wedding (R. 31, 42-43, 95). On October 24, 1957, Frances filed a suit for annulment or divorce and on February 13, 1959, their marriage was terminated by divorce (R. 4; Exs. 4, 6).[2] The marriage had never been consummated (R. 24, 30).

There was evidence that petitioner precipitated the quarrel which led to the dissolution of the marriage and that it was at petitioner's suggestion that there was no church wedding in Italy (R. 28, 48, 42-43, 54-55). His ex-wife testified that petitioner told her he married her "just to use the American citizenship" (R. 29). Petitioner, for his part, testified that he was not responsible for the quarrel, that Frances wanted the church ceremony to be held in the United States, and that he married for love (R. 13-14, 21-22, 97).

Petitioner had been deported from the United States in 1953, after he had entered this country illegally as a stowaway. Prior to this deportation, he had proposed marriage to an American citizen and had given her $500 to travel to Italy to marry him (R. 4, 8-11).

The special inquiry officer, on the basis of "all the evidence in the record", held that petitioner had failed

[2] The trial judge refused to annul the [redacted] on the ground that, under Ohio law, divorce was the exclusive remedy where a marriage was contracted through fraud (Exhibit 10).

to sustain his burden of proof, *i.e.*, had failed to establish that the marriage was not contracted for the purpose of evading the immigration laws.

ARGUMENT

1. The government established a prima facie case of deportability by proving that petitioner's marriage was contracted within the two years prior to petitioner's entry and dissolved within two years after his entry. The statute, Section 241(*e*) of the Immigration and Nationality Act of 1952 (*see supra*, p. 2), placed upon petitioner the burden of showing, "to the satisfaction of the Attorney General," that he did not marry to evade the immigration laws. Petitioner complains, however, that the special inquiry officer refused to consider petitioner's exculpatory evidence.

An examination of the decision of the inquiry officer refutes petitioner's claim. The opinion first considered various undisputed matters: that in 1952 petitioner had previously entered the United States illegally as a stowaway; that he had unsuccessfully tried to marry an American citizen to frustrate deportation based upon this illegal entry; that the 1956 civil marriage to Frances Garofalo was never consummated; and that the planned religious ceremony was cancelled by Frances three days after all arrangements had been completed. The question as to the cause of the dissolution of the marriage was then discussed. While noting that some of the evidence was favorable to petitioner, the inquiry officer rejected his contentions that his mother-in-law had endeavored at all times to break up the marriage and that Frances sought its termination in order to have affairs with men. The examiner noted that petitioner's inquiry as to Frances' citizenship status made dubious his pro-

fessions that he married in good faith. The examiner then said: "There are many other areas wherein the parties disagree as to what actually occurred. I do not believe that a discussion as to those matters or a determination as to the truth and accuracy of the statements of either respondent or Government's witnesses is essential to the decision in this case. However, one matter is of importance. In his opinion granting the petition for divorce filed by Frances Garofalo, the trial judge indicated that he was granting the divorce rather than the plea for annulment because that was the proper remedy in Ohio where fraud in procurement of the marriage is established." The special inquiry officer then specifically found "on all the evidence in the record" that petitioner had failed to sustain the burden of proof imposed by statute and that petitioner had failed to establish that he did not marry for the purpose of evading the immigration laws.

Petitioner's assertion that the hearing officer based his decision solely upon the opinion dissolving the marriage is thus without merit. In context, the examiner's statement that he was not going to resolve certain matters meant only that he did not have to determine all the details on which the parties disagreed. It was sufficient for him to resolve the contested issue upon his rejection of petitioner's attempt to show that Frances and her mother deliberately sought to dissolve the marriage; upon petitioner's immigration history of 1952; and upon petitioner's inquiry as to Frances' citizenship status. In view of this evidence showing that petitioner's conduct was motivated by a desire to re-enter the United States, the inquiry officer had ample ground for finding that petitioner did not sustain his burden of proof. The examiner could have added that the undisputed testimony that petitioner's

civil marriage was never treated as a bona fide marriage was also indicative of fraud.[3]

2. There is no merit to petitioner's claim that the district court erred in sustaining the motion for summary judgment. The fact that the administrative record contained conflicting testimony did not preclude such action. It was the function of the special inquiry officer, not the district court, to find the facts. See *Kessler* v. *Strecker*, 307 U.S. 22; *In re Cartellone*, 148 F. Supp. 676 (N.D. Ohio), affirmed *sub nom. Cartellone* v. *Lehmann*, 255 F. 2d 101 (C.A. 6), certiorari denied, 358 U.S. 867; *United States ex rel. Ruggetti* v. *Neelly*, 207 F. 2d 281, 284 (C.A. 7); Section 242 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1252(b). Cases in which the district judge is the trier of the facts are inapposite here. The only issue before the court was a legal one: whether there was substantial evidence in the administrative record to support the administrative findings.[4] Both courts below have ex-

[3] *Karagannis* v. *Brownell*, 251 F. 2d 882 (C.A. D.C.), a case arising under the Immigration and Nationality Act of 1937, is not in point. In that case the hearing examiner had found that the alien was deportable simply upon a finding that his marriage had been annulled and ruled that any explanation by the alien would be immaterial.

[4] An amendment of the 1952 Immigration Act provides that judicial review of deportation orders shall be in the court of appeals rather than the district court. Act of September 26, 1961, 75 Stat. 651, 8 U.S.C., Supp. III, 1105a. The purpose of the amendment was to hasten the final determination of deportation orders affecting aliens not in custody. See House Report No. 1086, 87th Cong., 1st Sess., pp. 22-30. This legislation recognizes that the scope of judicial review of deportation orders is a limited one. The amendment specifically provides that judicial review shall be determined solely upon the administrative records "and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive."

amined the transcript and answered that question in the affirmative. There is no occasion for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General,

HERBERT J. MILLER, JR.,
Assistant Attorney General,

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SEPTEMBER 1962

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